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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD; HONDA R&D CO., LTD; AND AMERICAN HONDA MOTOR CO. INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 50,000 members primarily represent injured plaintiffs in civil actions. This case is of special interest to ATLA because it pertains to an integral part of ATLA's mission: the preservation of the constitutional right to trial by jury.

Justice in America is administered, in large part, by the American people themselves. The jury is a distinctively democratic institution, reflecting the common sense and conscience of the community, beholden to no personal ambition, economic interest, or political constituency. The value of an independent jury is reflected in the array of special interests which have mounted an intense and heavily financed campaign to undermine its rule, whether it be under the guise of "tort reform" or in less obvious ways, such as the attack on a state constitutional guarantee that is central to this case. The heart of Honda's challenge to the damages awards here is an attack on the jury.

Written consents of both parties to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Honda's petition for protection from punitive damage verdicts reflects, in part, the myths of the tort reform campaign. Empirical data demonstrates that large punitive awards are not common or routine.

The notion that excessiveness review of punitive verdicts is so deeply ingrained in the Anglo-American system of justice as to be mandated by the Due Process Clause is false. Oregon rules, which preclude new trial merely on grounds of the size of the verdict, but appear to permit new trial on grounds of passion or prejudice of the jury, is similar to the law in many states. Excessiveness review was seldom employed in English and early American cases. Even where accepted, this practice is not viewed as a fundamental right.

Nor does the *Mathews v. Eldridge* balancing test suggest that the lack of excessiveness review violates due process. The *Mathews* test is not the appropriate standard for state judicial procedures. Moreover, the test does not support

Honda's argument. The interest of private litigants in money damages is not weighty. Honda has not demonstrated that juries are inherently unreliable or biased.

Finally, principles of federalism and the command of the Tenth Amendment weigh heavily against this Court's intrusion into matters of state procedure and substantive law.

ARGUMENT

I. THE PURPORTED "CRISIS" IN PUNITIVE DAMAGES AND PRODUCTS LIABILITY DOES NOT WARRANT THE IMPOSITION OF FEDERAL CONSTITUTIONAL RESTRAINTS ON STATE TORT LAW.

Once again, the tort reform special interests come before this Court seeking to constitutionalize the law of punitive damages.[1]

For much of the past decade, a massive, highly organized, and well-financed campaign by tort reform advocates has attempted to blame problems experienced by the liability insurance industry and the business sector on product liability law, particularly "skyrocketing" punitive damage awards.

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[1] *See* Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U.L. Rev. 1393, 1410 (1993)(Tort reformers have waged . . . an ambitious litigation campaign that includes *Browning-Ferris, Haslip, TXO Production*, and other cases. One corporate counsel predicted: 'We're going to keep throwing the challenges up there until one of them sticks.'"). For a comprehensive list of amici in these cases, see Michael Rustad, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C.L. Rev. 91, 125-28 nn.156-63 (1993).

> Products liability law's pernicious effects, through its influence on insurance rates, thus were portrayed as reaching deep into the fabric of American life, as well as crippling the business community.
>
> Using every technique of modern media-shaping, tort reform groups sought to assure that the public believed that products liabiiity law was the cause of this threat to our way of life.

Theodore Eisenberg and James A. Henderson, *Inside the Quiet Revolution in Products Liability*, 39 U.C.L.A. L. Rev. 731, 793-94 (1992). *See also* Stephen Daniels and Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 9-14 (1990)(describing "slice-of-death" advertising and other public relations techniques employed by tort reformers).

A predominant myth purveyed through this campaign is that large punitive damage verdicts have become common or routine. That assertion has been made to this Court by tort reform interests in previous cases. *See* Michael Rustad, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C.L. Rev. 91, 128-39 (1993). Honda repeats that assertion in this case. Pet. Br. at 20. The fact is, however, that "every empirical study of the question has reach conclusions that, to say the lease, fail to support the claim that punitive damages have grown dramatically in both frequency and size." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort System -- And Why Not?*, 104 U. Pa. L. Rev. 1147, 1254 (1992); *see also* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 24 (1992). For an exposition of the overwhelming empirical evidence on this issue, ATLA respectfully refers the Court to the Brief of Amicus Curiae Trial Lawyers for Public Justice.

In this brief, ATLA focuses on an even more disturbing myth propagated by the tort reform campaign, that of the "lawless jury." The civil jury has come under increasingly harsh attack by those who are frequently defendants in tort suits. *See* Stephen Daniels, *The Question of Jury Competence: The Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda Building*, 52 Law and Contemp. Probs. 269, 279-92 (1989); Kevin M. Clermont and Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1125-29 (1992); Kenneth J. Chesebro, Galileo's Retort: *Peter Huber's Junk Scholarship*, 42 Am. U. L. Rev. 1637, 1696-1705 (1993).

In the case at bar, Honda contends that "it is beyond dispute that juries often base their verdicts on extra-legal considerations and may be led astray by bias, by naked redistributionist impulses, by misunderstanding of the law, or by many other influences or deficiencies which should be unacceptable in our system of justice." Pet. Br. at 9. "It has long been a commonplace that juries, bedaled by evidence of the size and financial condition of a wrongdoer and feeling 'antipathy to a wealthy, out-of-state corporate defendant' may surrender to 'redistributionist impulses.'" Pet. Br. at 25.

ATLA addresses the single question presented by Honda: whether the Due Process Clause requires states to protect corporate defendants from juries by adopting rules that permit new trials where the court finds that a jury award is excessive. Although Honda's argument is addressed to both compensatory and punitive damages, this brief focuses its attention on judicial review of punitive damage awards. If, as ATLA contends, there is no federal constitutional right to new trial or remittitur on the ground that a punitive award is excessive, ATLA suggests that a similar result necessarily obtains with respect to compensatory damages.

II. HISTORY AND ACCEPTED PRACTICE DEMONSTRATE THAT REMITTITUR IS NOT A FUNDAMENTAL RIGHT REQUIRED BY THE DUE PROCESS CLAUSE.

A. Oregon's Denial of New Trial on the Basis that Damages are Against the Weight of the Evidence is not Unique.

At the outset, it is worth defining precisely what Honda demands of the State of Oregon. Although Honda's Question Presented uses the term "excessiveness review," it is clear that Honda refers specifically to a rule which "gives trial judges the authority to grant new trials, or to condition the denial of a new trial on a plaintiff's acceptance of a remittitur, when the judge concludes that excessive damages have been awarded." Pet. Br. at 16. The rule Honda seeks would permit "new trials in cases where juries returned verdicts against the weight of the evidence." Pet. Br. at 12.

Under this type of review, the size of the award in relation to the evidence is itself sufficient reason for the court to brand it "excessive." In this case, for example, Honda contended that the amount of punitive damages was too high in view of the type of misconduct, the amount of economic damages, other punitive damage awards in Oregon, and analogous criminal fines. Pet. Br. at 6-7. It is this type of "excessiveness" review, "to re-examine the evidence and set aside a verdict because it [is] excessive or in any other respect against the weight of the evidence," that the Oregon Court prohibited in *Van Lom v. Schneiderman*, 210 P.2d 461, 465 (Or. 1949), *quoted* in Pet. Br. at 3.

A separate species of "excessiveness" review was set forth in former O.C.L.A §5-802, subd. 5, permitting new trial on the basis of "Excessive damages, appearing to have been

given under the influence of passion or prejudice." Under this type of judicial review, the court's focus is not on the amount of damages, but on some irregularity, misconduct or corruption on the part of the jury. However, an extraordinarily large verdict might be indicative of passion or prejudice. *Van Lom* did not invalidate this basis for new trial.

> Prior to oral argument we asked counsel to brief the following question: "Can a valid distinction be made with respect to the application of Article VII, Section 3, between the power to grant a new trial on the ground of damages which are merely excessive and on the ground of excessive damages appearing to have been given under the influence of passion and prejudice?"

210 P.2d at 468. The court acknowledged that its prior rulings were not consistent on this question. Since there was no indication of passion or prejudice in the case before it, the *Van Lom* court's conclusion was to "deem it inappropriate to discuss the question above stated and leave [it] for future consideration . . ."

It does not appear that the Oregon Court squarely addressed this question thereafter. In *Noteboom v. Savin*, 326 P.2d 772 (Or. 1958), the court indicated that an appellate court cannot set aside a verdict as excessive unless such verdict is clearly the result of passion or prejudice in a jury trial. In 1980, the court of appeals suggested that availability of passion-and-prejudice review remained an open question. *Trenery v. Score*, 609 P.2d 388, 390 (Or. Ct. App. 1980). At the same time, it appears that trial courts were reviewing punitive damage verdicts on that basis. *See, e.g., Stafford v. Garrett*, 613 P.2d 99, 101 n.4 (Or. App. 1980)(plaintiff alleged error in trial court's grant of new trial on grounds of

excessive damages through passion and prejudice; the court did not reach the issue).

Although the current version of the rules no longer contains the phrase "passion or prejudice," a fair reading suggests that a party with evidence of such improper conduct on the part of the jury could seek a new trial under O.R.C.P 64B(1)("Irregularity in the proceedings of the . . . jury . . . by which such party was prevented from having a fair trial.") or under O.R.C.P 64B(2)("Misconduct of the jury . . ."). As indicated above, the Oregon Supreme Court has not held that Art. VII, §3 precludes such review. To the extent that the law of Oregon is unclear or unsettled on this point, ATLA suggests, this Court should refrain from subjecting it to federal constitutional scrutiny.

Oregon's position, declining to grant new trials on the basis of mere excessiveness, but allowing new trials on the basis of passion and prejudice or other jury misconduct, is hardly unique or "freakish" with no analog in the law of other jurisdictions." Pet. Br. at 17. Indeed, "Most courts require a finding that the jury was activated by passion or prejudice, improper motives or matters outside the record, before the jury verdict may be disturbed by remittitur." 2 James D. Ghiardi and John J. Kircher, Punitive Damages Law and Practice §18.07 at 27 (1989). *See also* Linda L. Schlueter and Kenneth R. Redden, Punitive Damages 8 (2d. ed. 1989)("Generally such [a punitive damage] award will not be overturned unless the defendant can show that there was an abuse of discretion such as the jury award was based on passion or prejudice.").

A recent annotation includes Oregon among 21 states whose "courts have adopted the view that the amount of punitive or exemplary damages awarded in an action involving personal injury or death is left to the sound

discretion of the trier of fact and absent a showing of passion or prejudice such award will not be set aside on the grounds of excessiveness or inadequacy." Jane Massey Draper, Annotation, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 ALR 5th 195, 273 (1993)(citing decisions from Alabama, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin).

ATLA suggests that Oregon's limited judicial review of damage awards does not "so depart from an accepted norm as to be presumptively violative of due process." Pet. Br. at 12, *quoting TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993).

B. Historical Acceptance of Excessiveness Review Does Not Establish It as a Fundamental Right.

1. Excessiveness review is not "Deeply Ingrained" in Anglo-American Law

Honda's resort to history is similarly flawed. Honda asserts: "As long ago as the mid-seventeenth century, English courts granted new trials in cases where juries returned verdicts against the weight of the evidence, and the practice was settled in all English courts by the mid-eighteenth century." Pet. Br. at 12-13 "In the years prior to the adoption of the Fourteenth Amendment the same principle was applied by state courts across the country." *Id.* at 15.

Honda is simply wrong on the historical record. The fact is that before American independence, the common-law courts of England did not grant new trials for excessive damages in tort actions. In 1764, one English court declared

that "there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in cases for torts." *Beardmore v. Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764). Most of the cases cited by Honda involve new trials for reasons of jury bribery or corruption. For a detailed exposition of both English and early American decisions, clearly demonstrating their extreme reluctance to review jury damage awards in personal injury cases, ATLA respectfully refers the Court to the Brief Amici Curiae of Legal Historians.

Indeed the recognition of punitive damages was itself prompted by the conviction held by English jurists that they were not permitted to reduce jury verdicts that appeared to exceed amounts required for full compensation. *See* 1 James D. Ghiardi and John J. Kircher, Punitive Damages Law and Practice §§1.01 and 1.02 (1989). Linda L. Schlueter and Kenneth R. Redden, Punitive Damages 8 (2d. ed. 1989).

The doctrine of punitive damages was first articulated explicitly in *Wilkes v. Wood*, 95 Eng. Rep. 768 (C.P. 1763), in which an official illegally searched the house of the publisher of a pamphlet which criticized King George III and illegally seized his property. In a companion case, *Huckle v. Money*, 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763), Lord Camden upheld "exemplary damages," recognizing that the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition. John Wilkes, the publisher, became something of a celebrity among the colonists, and there is some indication that they were aware of these punitive damage awards when the Seventh Amendment was drafted and ratified. *See* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-58 (1991).

In nineteenth century America, punitive damage awards were reviewed with great deference to the role of the jury. Decades before the Fourteenth Amendment was drafted, this Court recognized that punitive damages were "a well established principle of the common law" in which the determination of the amount "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth*, 54 U.S. (13 How.) 336, 371 (1851); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885)("The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages is attested by the long continuance of the practice."); *Barry v. Edmunds*, 116 U.S. 550, 565 (1886)("nothing is better settled than that, in such cases . . . it is the peculiar function of the jury to determine the amount by their verdict.").

2. Even After Wide Acceptance in American Courts, Excessiveness Review Has Not Been Regarded As Fundamental to Due Process.

Petitioner states, quoting from this Court in *Shad v. Arizona*, 111 S. Ct. 2491, 2501 (1991), "What has been regarded as fundamental . . . from time immemorial" is a 'concrete indicator of what fundamental fairness and rationality require.'" Brief at p.9. ATLA respectfully suggests that excessiveness review, even where permitted, is not regarded as a fundamental right.

Justice Story, who is credited for initiating the use of remittitur in the United States in *Blunt v. Little*, 3 F. Cas. 760 (C.C.D. Mass. 1822), realized that the practice of "interfering with the verdict" required him to "go to the very limits of the law." 3 F. Cas. at 762. He was referring, of course, to the Seventh Amendment. *See* I. Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested*

Alternatives, 38 Case Western Reserve L. Rev. 157, 169 (1987-88).

This Court, reviewing the history of remittitur practice in *Dimick v. Schiedt*, 294 U.S. 474, 480 (1935), observed that Mayne, in his Treatise on Damages, made clear that "it was always admitted that in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." The Court concluded that "Recent English decisions fully confirm this view in respect of the common-law rule as it existed at the time of the adoption of the Constitution." *Id.*

Noting these rather tenuous roots of the doctrine of remittitur prior to the adoption of the Seventh Amendment, this Court gave only reluctant approval to the practice in *Dimick*. The Court referred to the federal acceptance of remittitur as a "doubtful precedent" that should "not [be] extended by mere analogy" to additur. *Id.* at 485. After explicitly stating its reservations, the Court stated:

> In the last analysis, the sole support for the decision of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges --- *a practice which has been condemned as opposed to the principles of the common law by every reasoned English decision, both before and after the adoption of the Federal Constitution*, which we have been able to find. In the light reflected by the foregoing review of the English decisions and commentators, it therefore may be that, if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and

> uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

Id. at 484-85 (emphasis added). There is not a hint by the Court that the practice of ordering a new trial based on excessive damages even approaches the level of fundamental right, despite its longstanding practice in federal courts.

C. The Right to Trial By Jury, Not the Right to Control the Jury, Is Fundamental In the American System of Justice.

Honda's attempt to elevate judicial review of jury damage awards to a fundamental right suffers from a more basic fallacy. This Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-16 (1991) held that the common law procedure for assessing punitive damages has been so widely accepted for so long that it presumptively comports with due process. Honda erroneously extends this principle to state that historically practiced procedures are *required* by due process.

This Court has made it clear that the Due Process Clause protects only fundamental rights. Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling v. United States*, 493 U.S. 342, 352 (1990).

This Court has repeatedly declined to elevate procedural rules, despite their importance to litigants, to the status of constitutional rights. "It has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 US 554, 564 (1967), *accord, Estelle v. McGuire*, 112 S Ct. 475, 481 (1992). In civil cases, too, the Fourteenth Amendment does not impose "a rigid constitutional code of procedural necessities." *Walter v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985).

Honda attempts to circumvent this principle by means of an astonishing exercise in historical revisionism. Citing Holdsworth, Honda states that the history of the jury "is in large part a chronicle of attempts [by the courts] to implement 'some regular method of controlling the verdicts of juries.'" Pet. Br. at 11. Without this control by the courts, the jury "would never have won [its] popularity. *Id.* Therefore, Honda reasons, it is not the jury trial, but "the practice of providing judicial excessiveness review of damages verdicts [that] is deeply rooted in English and American law." *Id.*

The fact is that Americans enjoy the right to trial by jury because it is guaranteed to them by the U.S. Constitution and the constitutions of nearly every state. *See* Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 Cath. U.L. Rev. 737, 739 n.11 (1989)(citing 48 state constitutional provisions). Judicial attempts to control the verdicts of juries were bitterly hated by the colonists and new citizens under the Articles of Confederation. When the opportunity arose, they placed the

most secure restraint at their disposal, in the form of a constitutional guarantee, on judges, not juries.[2]

As a result the "right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979)(Rehnquist, C.J., dissenting). In addition, "the scope and effect of the Seventh Amendment . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted." *Id.* at 339.

A primary grievance of the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. Roscoe Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973); *Parklane Hosiery, supra*, 439 U.S. at 340 (Rehnquist, C.J., dissenting); *Chauffeurs, Teamsters and Helpers, Local No.391 v. Terry*, 110 S. Ct. 1339, 1353 (1990)(Brennan, J., concurring). The colonists complained of this infringement through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence ("For depriving us in many cases, of the benefits of Trial by Jury"). Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993).

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2 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend vii.

Independence from England did not diminish the sacredness of the jury in the eyes of the new Americans. The absence in the proposed Constitution of an express guarantee of the right to trial by jury in civil actions was condemned by the Antifederalists as sufficient cause to reject the entire Constitution. Their demand for an explicit guarantee of the right to trial by jury led to the adoption of a Bill of Rights as a condition to ratification of the constitution itself. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966); Wolfram, *supra*, at 667-730 (extensive review of ratification debates); Landsman, *supra*, at 599.

Those who fought so strenuously for this right in 1791 saw the jury as an essential element of limited, democratic government. The jury was intended as a check on the power of the federal judiciary. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). Reacting to their experiences at the hands of autocratic British judges,

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (Rehnquist, C.J., dissenting). *See also Granfinanceira, S.A. v. Nordberg*, 492 U.S. 33, 83 (1989)(White, J., dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge").

In addition, the new Americans regarded juries "as more than a 'mode of trial'; they were instruments of local

government as well." Arnold, *supra*, at 833. *See also*, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 144-49 (1991). The fact that juries would arrive at different results than judges was a truism for the drafters of the Seventh Amendment, particularly in disputes between the wealthy and the common person. In those cases, it was the drafters' conviction that the judgment of the jury would be more accurate. *Id.* at 147. In any event,

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 348 (Rehnquist, C.J., dissenting).

In view of this history the Supreme Court has consistently emphasized the fundamental nature of the right to jury trials and has viewed any curtailment with great disfavor. Describing the right to trial by jury as "a great constitutional right," the Court stated that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872). *See also, Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence"); *See also, Jacob v. New York*, 315 U.S. 752, 753 (1943) ("The right of jury trial in civil cases at common law . . . should be jealously guarded by the courts"); *Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded").

The Court has repeatedly emphasized that

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), *quoted* in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344-45 (1990).

The history of the jury in America, ATLA submits, is a chronicle of *resistance* to judicial control of jury verdicts. *This* is the "deeply-ingrained tradition" of American law.

III. THE MATHEWS TEST DOES NOT REQUIRE THE STATES TO PROVIDE NEW TRIALS ON GROUNDS OF EXCESSIVE DAMAGES AS A MATTER OF PROCEDURAL DUE PROCESS.

A. Mathews Does Not Supply the Appropriate Test in Determining Whether Full Judicial Proceedings Comport with Due Process.

Honda suggests that "in analyzing the constitutional adequacy of such novel state procedures . . ., the Court makes use of the familiar three-part test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) . . .". Brief at p. 18.

At the outset, ATLA submits that *Mathews v. Eldridge* does not provide the appropriate due process standard in this case. *Mathews* has been applied to administrative proceedings and other proceedings that do not provide the full panoply of

protections of a full trial. *Medina v. California*, 112 S. Ct. 2572 (1992), held that *Mathews* does not provide the appropriate framework for assessing state procedural rules which are part of the criminal process. "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Id.* at 2577. The Court concluded that the appropriate approach was the much narrower and less intrusive test set forth in *Patterson v. New York*, 432 U.S. 197, 202 (1977)(whether the challenged rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.").

This case comes to this Court following a full judicial trial by jury applying state tort law. If there is any area of law that is peculiarly within the expertise and experience of the states, it is the law of torts. ATLA respectfully submits that the Patterson test is the appropriate standard by which to determine whether Oregon's new trial rules violate procedural due process. ATLA submits that the discussion in Part II, *supra*, demonstrates that excessiveness review is not "so rooted in the traditions and conscience of our people as to be ranked fundamental."

Even if this Court should apply the *Mathews* balancing test, it is clear that none of the factors weighs in favor of requiring states to adopt excessiveness review. *Mathews* requires

> consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 336 (1976).

B. The Interest of Litigants in Private Suits For Money Damages is Not Weighty.

Honda argues that its interest at stake is great since punitive damage verdicts can be large. Pet. Br. at 19-20. This misperceives the nature of this Court's hierarchy of protected interests. Honda's property interest is, constitutionally speaking, slight. In applying the *Mathews* analysis, this Court has dealt with a spectrum of private interests. Appropriately, the greatest weight is accorded to the loss of physical liberty. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). Property interests, particularly "mere loss of money," *Addington v. Texas*, 441 U.S. 418, 425 (1979), are far less substantial. "The typical case involving a monetary dispute between private parties" lies at the "end of the spectrum." *Id.* at 423.

This Court has also pointed out that "while private parties may be interested intensely in a civil dispute over money damages," society has "minimal concern with the outcome." *Santosky, supra*, 455 U.S at 756. *See also In re Winship*, 397 U.S. 358, 371 (1970) (Harlan concurring) ("In civil cases, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.")

C. Honda Fails to Establish Substantial Risk of Erroneous Deprivation and the Value of Substitute Safeguards.

1. Honda Fails to Establish Inherent Unreliability or Prejudice of Juries

Honda claims that "it is simply indisputable that a very substantial percentage of punitive jury awards are excessive and thus legally erroneous." Pet. Br. at 29. Substantiation for this "indisputable" proposition is conspicuously thin. The "work of social scientists" Honda places before this Court consists of several very limited studies which do not support the propositions Honda assigns to them.

As proof that juries "apply evidence incorrectly and award compensation for expenses they were not supposed to consider," Honda cites M. Selvin and L. Pincus, The Debate Over Jury Performance: Observations from a Recent Asbestos Case (1987). Pet. Br. at 10-11. In that study, researchers interviewed jurors from a single case involving four workers suffering from asbestos disease. Actually, the researchers found that the jurors conscientiously calculated each item of damages for each plaintiff (lost earnings, medical expenses, pain and suffering) and arrived at a total for each. However, they included past medical expenses, which the trial judge had instructed them not to include. *Id.* at 55. This finding hardly stands as a ringing indictment of the civil jury.

To prove bias against corporate defendants, Honda cites a relatively brief article by an assistant professor of psychology, Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 225 (1989). The author performed no empirical research; the article surveys the results of other studies. Only one study dealt with punitive damages. Kaplan and Miller, *Group Decisionmaking and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule*, 52 J. Personality & Soc. Psychology 306 (1987). That study was designed to illustrate group decisionmaking

dynamics, not whether jurors are biased. Professor Greene speculates that jurors are occasionally biased against corporations, but cites no study for that proposition.

Honda also cites A. Chin and M. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials 42-45 (1985). The researchers found that in personal injury cases in Cook County, juries tended to return larger verdicts against corporate defendants than against individuals for the same injuries. However, the researchers did not interview the jurors to ascertain if this divergence was due to anti-corporation bias. Moreover, they concede that the study did not account for liability issues: Defendants in "high-stakes" products liability cases, who are nearly always corporations, were compared to defendants in auto accident cases, generally individuals. They also suggest that settlement strategies might also explain the variations. *Id.* at vi and 58.

With respect to punitive damages, the fact corporations might be subjected to higher verdicts essentially restates the obvious. Corporate misconduct typically threatens a larger number of people and a larger punitive award may be necessary to punish and deter a large corporation. Exceedingly few individual defendants, for example, possess Honda's net worth of $5 billion or engage in conduct that threatens the safety of hundreds of thousand of consumers.

Honda also appends to its brief a long list of appellate decisions holding punitive damage verdicts excessive. This demonstration borders on the irrelevant precisely because, as Honda states, the vast majority of states delegate broad discretion to juries, leaving it to judges and appellate courts to apply more specific guidelines. Reduction of verdicts does not indicate jury bias or disregard of instructions; it is an intended feature of the process. Nor does Honda justify its assumption that the judicially determined quantum of

damages is necessarily the "correct" one. Viewing punitive damages as "expressive of the community attitude towards one who wilfully and wantonly causes hurt or injury to another," *Home Insurance Co. v. American Home Prods. Corp.*, 550 N.E.2d 930, 934 (1990), ATLA suggests that the judgment of jurors drawn from the community provides a more accurate mirror of community attitudes.

In this regard, Honda wholly ignores the second part of this *Mathews* element: the value of the additional safeguards Honda seeks. Petitioner does not demand that the amounts of all punitive damage awards be determined by judges, but rather the opportunity for a new trial. Honda's due process argument is premised on the notion that juries are biased against out of state corporations, are swayed by sympathy and disregard instructions. Honda does not explain how placing the case in the hands of a second jury will substantially improve the fairness of the process.

It may also be worth noting that judges are not immune from the same pressures. An illuminating remark is made by Judge Richard Neely, of the West Virginia Supreme Court of Appeals, whose opinion was recently before this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993):

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because in-state plaintiffs, their families and their friends will reelect me.

Richard Neely, The Product Liability Mess 4 (1988).

2. The American Jury Works Well.

Contrary to Honda's assertion, Americans who serve on juries do their job quite well. The largest empirical study of actual jury performance, sponsored by the Roscoe Pound Foundation, found that:

> Juries overwhelmingly take their duties seriously . . . Juries are evidence-oriented . . . with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them . . . Juries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases . . . The evidence also strongly suggest that jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy.

John Guinther, The Jury in America 102 (1988). Guinther concludes that "juries are, on the whole, remarkably adept as triers of fact. Virtually every study of them, regardless of research method, has reached that conclusion." *Id.* at 230.

Recent empirical studies confirm this picture of the American civil jury. A study of jury awards of noneconomic damages which, like punitive damages, permit broad discretion on the part of the jury, compared jury awards to the amounts that judges and professional arbitrators would award. The researchers found that "damages awarded for pain and suffering and disfigurement and the rationales behind the awards did not differ between the two sets of decisionmakers." The authors concluded that "the data lend no support to the widely held view that jurors are more generous than judges or arbitrators in awarding noneconomic damages." Neil Vidmar and Jeffrey Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A*

Comparison of Jurors with Legal Professionals, 78 Iowa L. Rev. 883 (1993).

Another recent study compared verdicts rendered by juries with those rendered by judges in bench trials. The researchers observed that in products liability cases, plaintiffs tended to prevail more often on liability and received higher awards judges than from juries. Kevin M. Clermont and Theodore Eisenberg, *Trial by Judge or Jury: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1138-41 (1992).

Another study focusing on juror attitudes found that jurors tended to be concerned with the social costs of large awards and to be more skeptical of plaintiffs than of business defendants. Valerie Hans, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 Law and Socy Rev. 85, 93 (1992).

For a more thorough analysis of these and other empirical studies, ATLA respectfully refers the Court to the Brief of Amicus Curiae Trial Lawyers for Public Justice.

No one would claim that juries never render verdicts based on improper considerations. However,

> [T]he Clause does not require that the procedure used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error . . . [rather] procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.

Walters v. National Assoc. of Radiation Survivors, 473 U.S. 305, 320-321 (1985).

D. Governmental Interest Weighs Against Imposing New Trial Rules on the States.

Honda suggests that any additional procedures required would not be burdensome to the government since other states already provide remittitur. This argument might well be made to the Oregon Supreme Court in seeking a change in state law. In this Court, however, Honda seeks to open up an entirely new field of federal constitutional law devoted to scrutinizing the civil procedures of the states. Should the Court adopt Honda's view, every defendant, having exhausted review provided by state law, will be entitled to raise due process arguments that the type of remittitur provided by the state is not sufficiently favorable, or that rules governing new trials, directed verdicts, verdict impeachment, or other procedures do not adequately protect their due process rights against wayward juries. This Court will be in the position of micro-managing this effort to constitutionalize each state's procedural rules.

IV. THE CONSTITUTIONALIZING OF STATE TORT LAW VIOLATES PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT.

A. Review of Punitive Damage Awards for Excessiveness is a Matter of State Law

Punitive damages "have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)(upholding a $10 million punitive damage award). This Court has already declined to impose on the States the type of review sought by Honda, focusing on comparison between the punitive award and economic damages, other awards, and criminal penalties, Pet. Br. at 6-7. In *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S.

Ct. 2909, 2922 (1989), Part IV of the majority opinion, in which all members of the Court concurred, states:

> Although petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, and not federal common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state and federal law issues. For obvious reasons we decline that invitation.

B. A Mandate Requiring Oregon to Overrule Its Own Interpretation of Its Constitution and Amend Its Rules of Civil Procedure Would Violate the Tenth Amendment

The Tenth Amendment of the Constitution of the United States stands as a substantive limit on federal power to intrude into the sovereign sphere of the states.[3] This limit was viewed as an essential feature of the federalist system by the drafters of the Constitution. Indeed, eight states ratified the Constitution only on condition that their proposed bills of rights be considered after ratification, and every one of these included a version of 10th amendment. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 569 (1985)(Powell, J., dissenting); Laurence Tribe, American Constitutional Law 568-70 (2d ed. 1988).

This Court has proclaimed that "The [Tenth] Amendment declares the constitutional policy that Congress

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[3]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X..

may not exercise power in a fashion that impairs the States' integrity, or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 546 n.7 (1975). Hence, this Court suggested in *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 633 (1874), that, even if the commerce clause would allow it, Congress may not have the power to authorize the Supreme Court to supplant state courts as the authoritative declarers of law within their jurisdictions by functioning as a court of last resort with respect to state common law and statutory law. Professor Tribe concludes from dicta in *Griffin v. Breckenridge*, 403 U.S. 88, 102, 104 (1971), that "Congress may not have the power to use its commerce clause or thirteenth and fourteenth amendment authority wholly to federalize such traditional areas of common law as the law of torts or of contracts." Tribe, *supra*, at 380.

National League of Cities v. Usery, 426 U.S. 833 (1976) held that Congress could not impose the federal minimum wage requirement on the states as employers. The Court held that "Congress may not exercise that power [to regulate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855. ATLA submits that a states' procedural rules governing new trials, particularly where they reflect the interpretation of the state constitution by the highest court of the state, is an integral governmental function of the state. ATLA further submits that the limitation on federal power to dictate to the States in such areas applies to the judicial as well as the legislative federal branch.

National League of Cities, of course, was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). However, the Court did not intend in *Garcia* to leave state interests bereft of constitutional

protection. Rather, the interests of the states "are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. Specifically, the fact that the constitution provides for direct representation of the states in Congress, means that the states can, and in fact have exercised considerable influence over legislation. This, the Court held, was the primary means chosen by the Founders to protect state sovereignty. *Id.* at 552-56.

The Court suggests at the close of its opinion in *Garcia* that there are "affirmative limits the constitutional structure might impose on federal action affecting the States" where the political process has not performed as intended. *Id.* at 556; *see also Id.* at 564 n.7 (Powell, J., concurring).

Honda asks this court to overrule the Oregon Supreme Court's interpretation of the Oregon Constitution and amend the Oregon Rules of Civil Procedure. The political process providing representation of Oregon in the Congress, of course, is of no avail in this situation. ATLA suggests that, at the very least, the possible collision with the Tenth Amendment guarantee of principles of federalism counsels against such direct interference in a State function so integral to sovereignty and historically relegated to the States.

In recent decisions, this Court has emphasized the importance of deference to state sovereignty in our system of federalism. *See Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991)(comity and federalism require federal courts entertaining habeas corpus petitions to accord a full measure of respect to state procedural rules under the adequate state ground doctrine); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991)(Federal Age Discrimination in Employment Act does not preempt mandatory retirement provision for judges contained in state constitution).

In *Gregory v. Ashcroft*, Justice O'Connor's majority opinion featured a compelling essay on the vitality of states' rights, not as the mere absence of federal interference, but as a positive value essential to self-government. *Id.* at 2399. Moreover, the "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties,'" *Id.* at 2400. quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). ATLA suggests that the right to trial by jury is one such fundamental liberty.

* * *

At the very heart of Honda's arguments is a myth: The lawless jury. Two centuries of jurisprudence and extensive recent empirical research flatly contradict Honda's dark and cynical portrait of our civil justice system. The myth is wrong. Due process of law finds no higher expression than in the independent civil jury.

CONCLUSION

For these reasons, Amicus urges this Court to affirm the judgment of the Supreme Court of Oregon

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